MAYBANK ISLAMIC BHD v. M-10 BUILDERS SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ASMABI MOHAMAD J
[CIVIL ACTION NO: 22M-26-04-2013]
23 MARCH 2015

BANKING: *Banks and banking business – Islamic Banking – Murabahah overdraft facility ('MOD facility') – Purchase and resale of same assets – Whether agreement complied with murabahah concept of financing – Whether purchase and resale of same assets prohibited under shariah principal of financing – Whether unilateral revision of MOD facility – Whether facility null and void*

BANKING: *Banks and banking business – Islamic banking – Murabahah overdraft facility – Charge of ta'widh – Requirements – Whether element of default or neglect proven – Whether claim for ta'widh justified*

BANKING: *Banks and banking business – Islamic banking – Murabahah concept of financing – Whether camouflaged in form of al-Bainah – Whether rendered contract null, void and unenforceable – Whether conventional transaction*

LIMITATION: *Accrual of cause of action – Whether action filed out of time – Whether plaintiff slept on its rights to claim ta'widh – Whether conduct equivalent to waiver – Whether doctrine of laches or acquiescence applied – Limitation Act 1953, s. 6*

Vide a letter dated 31 July 2003 and subsequently additional letters of offer, the plaintiff had granted the first defendant the following facilities: (i) an Islamic term loan ('BBA') of RM2,000,000; (ii) a *murabahah* overdraft facility ('MOD facility') of RM3,000,000; (iii) an Islamic bank guarantee ('IBG') of RM4,000,000; (iv) a *murabahah* overdraft against progress claim ('MOD/PC') of RM5,000,000 ('the first LO'). Under the first LO, it was clearly stated that the profit rate for the MOD facility was 8% per annum and the repayment term for the MOD facility was subject to yearly review. Based on the agreed rate of 8% per annum, the parties complied with the *murabahah* concept facility whereby the parties had executed the assets sale agreement ('ASA') and assets purchase agreement ('APA') ('the first ASA and APA') dated 15 December 2003. The salient features of the first ASA and APA *inter alia* were that the tenure of the MOD Facility was subjected to yearly review which was to be settled from the date of the first drawdown. Subsequently, the said facility was restructured pursuant to a letter of offer dated 8 December 2004 ('the second LO') and by the terms of the second LO, the plaintiff had agreed to increase the limit of the MOD to RM5,000,000 and the IBG was reduced to RM2,000,000. This MOD facility was also subjected to the execution of a new ASA and APA. Pursuant to that, a facility agreement dated 23 December 2004, APA and ASA dated 23 December 2004 was executed. The first LO was superseded by the second LO which provided that the MOD facility was to be settled by one lump sum

payment within twelve months financing period subject to yearly review. The first defendant was informed *vide* a letter dated 14 March 2005 that the restructured MOD facility had been released and would be subjected to annual reduction of RM500,000 until the limit was reduced to RM3,000,000. The first deduction was made on 1 December 2005. By the plaintiff's letter dated 16 August 2006, the restructured MOD facility was renewed subject to semi-annual reduction of RM500,000 on the existing MOD facility to half yearly sinking fund of RM500,000. Other terms in the second LO remained unchanged. *Vide* a letter dated 28 May 2009, the second LO was reviewed whereby the plaintiff had restructured the MOD facility by reducing the existing limit under the MOD facility from RM4,500,000 to RM3,500,000 ('the third LO'). A new APA and ASA was to be executed. The third LO was rejected by the first defendant. The first defendant had counter-proposed for the plaintiff to utilise the sinking fund of RM1,500,000 to reduce the MOD facility to RM3,000,000 instead of RM3,500,000 as suggested by the plaintiff *vide* the third LO. This resulted in a fourth letter of offer dated 16 July 2009 having been issued by the plaintiff ('the fourth LO'). Under the fourth LO, the plaintiff had accepted the first defendant's request and the MOD facility was reduced to RM3,000,000. However, the terms in the fourth LO was not accepted by the first defendant as the first defendant was still insisting on the terms of the second LO and had demanded that the terms of the second LO be adhered to with no new APA and ASA to be executed. This led to an additional letter of offer having been issued. It was a condition under the additional letter of offer for the first defendant to furnish three guarantors to guarantee the MOD facility. The plaintiff, by a letter dated 21 April 2010, had informed the first defendant that there was an outstanding amount under the term loan financing and the MOD facility. The plaintiff claimed against the defendants the sum of RM4,599,016.37 as at 28 February 2013 pursuant to a MOD facility which the first defendant had defaulted. The second defendant was sued in his capacity as the guarantor to the first defendant. The plaintiff also claimed for late payment charges by way of *ta'widh* based on Interbank Islamic Money Market Rate on the principal sum of RM3,857,201.38 with effect from 1 March 2013 until realisation and costs. The plaintiff in its pleadings, argued *inter alia* that (i) MOD facility under the master facility agreement dated 15 December 2003 and the letter of offer dated 31 July 2003 had been superseded by a facility agreement dated 23 December 2004 and a letter of offer dated 8 December 2004; (ii) the MOD facility was only for one year and the reutilisation of the same was subject to the execution of the new ASA and APA on a yearly basis; (iii) the defendants failed to renew the facility agreement dated 23 December 2004 and the same had expired on 22 December 2005; (iv) since the MOD facility had expired on 22 December 2005, the plaintiff was entitled to charge *ta'widh* on the outstanding amount due under the MOD Facility. On the contrary, the first defendant agreed to provide a letter of undertaking to settle the arrears under

the term loan facility but disputed the amount stated under the MOD facility. This led to an action having been filed by the first defendant against the plaintiff which was subsequently withdrawn. There was also a consent order ('CJ') recorded between the first defendant and the plaintiff wherein the first defendant admitted liability to pay the MOD facility but disputed the amount outstanding. The defendants also counterclaimed against the plaintiff contending, *inter alia* (i) that the facility granted to the first defendant was not Shariah compliant as there were no ASA and APA executed by both parties; (ii) the APA and ASA executed on 23 December 2004 were null and void, invalid and had grossly infringed the basic tenets of the Islamic principle of financing because it was for the same assets that were the subject matter of the ASA and APA dated 15 December 2003 and also were for assets already owned by the first defendant. The first defendant further argued, *inter alia*, that: (i) the plaintiff had prematurely terminated the MOD facility which would only expire on 16 February 2014; (ii) the claim for *ta'widh* was misconceived, unreasonable and contrary to the principle of financing premised on Shariah; (iii) the plaintiff's action was barred by limitation and there was laches and/or acquiescence on the part of the plaintiff; (iv) there was no mutual consent of the parties to the proposed restructuring and rescheduling of the MOD; and (v) the plaintiff had unilaterally reduced the amount granted under the MOD facility which caused the first defendant to suffer loss and damages.

Held (dismissing plaintiff's claim and defendants' counterclaim; each party to bear own costs):

(1) The MOD facility under the master facility agreement dated 15 December 2003 was based on ASA and APA on the asset already owned by the first defendant. The transaction did not involve a sale of the asset owned by the plaintiff but a buy back of the asset owned by the first defendant at a mark up price. The transaction did not involve the transfer of ownership of asset from the seller to the purchaser which was a common feature inherent of the sale contract. The transaction also lacked the features that the asset must already be in existence and owned by the seller. Also, there was non-disclosure of an acquisition cost. As such, the plaintiff had not complied with the *murabahah* concept of financing. The master facility agreement dated 15 December 2003 and the facility agreement dated 24 December 2004 had not complied with the basic tenets of *murabahah* concept of financing. Since the purchase and resale of the same assets is prohibited under the Shariah principle of financing, the MOD facility was null and void and of no effect. (para 75)

(2) The plaintiff had unilaterally revised the MOD facility and had forced the first defendant to execute a fresh ASA and APA using the very same asset. This was done after the lapse of the second ASA and APA on 23 December 2005. Between 23 December 2005 to 28 May 2009, there

was no fresh ASA and APA executed. The first defendant had refused to accept the plaintiff's offer which had caused the amount of the MOD facility having been reduced substantially. This in itself had breached the very tenet of the *murabahah* Financing in general and the Islamic Concept of financing which must be based on mutual consent of the contracting parties. This essential element was lacking in terms of the revised MOD facility, which was unilaterally revised by the plaintiff. Therefore, it was void and unenforceable. (para 78)

(3) Mutual consent is required on the terms of the agreement and further consent is required for the lawful appropriation of property. The first defendant is protected under the Islamic financing concept not to accept the inequitable imposition on him by the new unilateral ASA and APA which was forced on to him by the plaintiff. The plaintiff is prohibited from enforcing its rights, which clearly violated the basic tenets of financing premised on the Islamic concept of financing. Therefore, the restructuring and rescheduling of the MOD facility was a usurpation/ 'ghasab' by the plaintiff as the plaintiff did not obtain the mutual consent of both the contracting parties. (paras 79, 80 & 81)

(4) Before the plaintiff could charge *ta'widh* the plaintiff must prove that there was in fact a default and/or neglect on the part of the first defendant. Since the plaintiff had not proven the element of default and/or neglect on the part of the first defendant under the MOD facility, which was one of the three salient features to justify the plaintiff to claim for *ta'widh*, the plaintiff's claim for *ta'widh* must fall. (paras 98 & 100)

(5) The counterclaim of the first defendant was premised on the plaintiff's action to reduce the facility amount by RM8,400,000 which the first defendant claimed was done unilaterally. At no time did the first defendant request for the same to be reduced. Further, there was no valid reason given as to why the said facility had been reduced unilaterally. This again had infringed the basic principle of financing premised on Islamic concept as it lacked the element of mutual consent. (para 70)

(6) As the *murabahah* contract was illegal, despite the CJ having been executed, it did not mean that this court had no jurisdiction to decide on the issue of illegality. Once the issue of illegality had been established, this court is vested with the jurisdiction to deal with the matter despite the fact that the same was not pleaded in the pleadings. The principle that the court ought not to enforce an illegal contract if the illegality is duly brought to the notice of the court would be applicable. The issue of illegality could be raised at any time and the court must take cognizance of this illegality notwithstanding that the same had not been pleaded by the defendants. (paras 85-87)

(7) The *murabahah* concept of financing was adopted but it was camouflaged in the form of *al-Bainah* rendering the contract entered into between the plaintiff and the defendants null, void and unenforceable. Despite labelling the MOD facility as *murabahah* based contract, the conduct of both parties showed that parties to the agreement were treating the contract as a conventional transaction. Despite the fact that there was no ASA and APA having been executed, the amount under the MOD facility was released to the first defendant and the same had been accepted by the defendants to meet the first defendant's financial obligations. (paras 91 & 92)

(8) By its own admission, the plaintiff had asserted that the MOD facility had matured on 5 May 2006. Therefore, the plaintiff's cause of action against the defendants would have arisen and/or accrued on or by 5 May 2006. This action having been filed on 23 April 2013 was beyond the statutory provision of six years provided under s. 6 of the Limitation Act 1953. Therefore, the plaintiff's action against the defendants was barred by limitation. On this ground alone, the plaintiff's action against the defendants ought to be dismissed. (para 93)

(9) The amount of *ta'widh* claimed by the plaintiff was substantial, reaching the sum of about RM2,000,000. It was not disputed that the plaintiff had not notified the defendants of its intention to charge *ta'widh* in respect of MOD facility. From May 2006 until April 2013, the plaintiff had not served any notices of default to the defendants. Further, no such notices were tendered as evidence during the trial. The plaintiff, by its action to claim *ta'widh* retrospectively for a period of for almost seven years was against the spirit and intent of financing which was premised on Islamic concept. In addition, the plaintiff had slept on his rights. It was unethical, un-Islamic and inequitable for the plaintiff to act in such a manner. This conduct was held to be equivalent to a waiver. (paras 94 & 95)

(10) The plaintiff had given the impression that it would not be pursuing its claim for *ta'widh*. Having abandoned the claim earlier and then pursuing the same after seven years would not be equitable to the defendants. Lapse of time and delay in prosecuting a claim against the defendants would justify the defendant to raise laches and/or acquiescence to deny the plaintiff of the sums claimed. It is unjust and inequitable for the plaintiff to claim the same *vide* this action and estoppel would work against the plaintiff. Further, the plaintiff merely relied on the summary of the calculation of *ta'widh* without producing the actual workings of the calculation which led to the figure of RM2,000,000,00 *ta'widh* having been imposed on the defendant. (paras 96 & 103)

(11) Despite the first and second ASA and APA dated 15 December 2003 and 23 December 2004 respectively having been executed, there were no fresh ASA's and APA's being executed after the lapse of the Second ASA and APA on 22 December 2005. Notwithstanding that, the plaintiff had allowed the first defendant to utilise the MOD facility beyond the period of the expiry of the second ASA and APA. Both the contracting parties ignored the features of financing premised on the Islamic concept termed as *murabahah* and blatantly regarded the transaction as if it was a conventional loan. (paras 104 & 106)

(12) By their conduct, both parties were privy to the illegality and had camouflaged the MOD facility as *murabahah* and both had benefited from this illegality. This transaction had clearly violated the basic tenets of the financing premised on the Islamic concept. Further, the contract involving the MOD Facility which the parties termed as *murabahah* was contrary to the basic tenets of financing based on *murabahah* as there were no fresh ASA and APA having been executed. The court would not assist the parties who had come to court to seek relief, if they had not come with clean hands. Both the plaintiff and the defendants had not discharged the onus of establishing each party's pleaded case against the other on the balance of probabilities. (paras 106 & 107)

Case(s) referred to:

Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202 ***(refd)***
Chow Kay Kong v. Ching Tong & Ors [1967] 1 LNS 30 FC ***(refd)***
Eastern Enterprises Ltd v. Ong Choo Kim [1969] 1 LNS 35 HC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC ***(refd)***
KPM Khidmat Sdn Bhd v. Tey Kim Suie [1994] 3 CLJ 1 SC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor]2003] 2 CLJ 19 CA ***(refd)***
Mustafa Osman v. Lee Chua (P) [1996] 3 CLJ 494 CA ***(refd)***
Natha Singh v. Syed Abdul Rahman & Anor [1962] 1 MLJ 265 ***(refd)***
Nasib Singh v. Ramasamy [1968] 1 LNS 85 HC ***(refd)***
Perwira Habib Bank (M) Bhd v. Penerbitan ASA Sdn Bhd & Ors [1997] 1 LNS 229 HC ***(refd)***
Selvaduray v. Chinniah [1939] 1 LNS 107 FC ***(refd)***
Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd [2007] 1 CLJ 611 CA ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 24
Evidence Act 1950, ss. 73A, 101(1)
Limitation Act 1953, s. 6
Rules of Court 2012, O. 27 r. 3

Other source(s) referred to:

Al-Sayuti, A-Sybah Wa al-Nazair, BNM, pp 83-84
Mohamad Akram Laldin and Others, Islamic Legal Maxims and Their Application in Islamic Finance, (Kuala Lumpur: ISRA, 2013), p 26

Murabahah Policy Documentation, Bank Negara Malaysia on 23 December 2013, Principles and Practices of Shariah in Islamic Finance (Shariah Parameter Reference 1 Murabahah); Islamic Financial System Principles for Operations by International Shariah Research Academy for Islamic Finance, p 205
Shariah Resolutions in Islamic Finance, p 26

For the plaintiff - Syed Fadzil Hashim Al Habshi (Noraini Yacob with him); M/s Sidek Teoh Wong & Dennis
For the defendants - D Krishna (Venka Arun with him); M/s Ven & Assocs

Reported by Sandra Gabriel

JUDGMENT

Asmabi Mohamad J:

Introduction

[1] By its writ and statement of claim dated 25 April 2013 ("SOC") the plaintiff claimed against the defendants the sum of RM4,599,016.37 as at 28 February 2013 pursuant to a *murabahah* overdraft facility with Account Number 5642583143397 granted by the plaintiff to the first defendant which the first defendant had defaulted. The second defendant named herein was being sued in his capacity as the guarantor to the first defendant. The plaintiff also claimed for late payment charges by way of *ta'widh* based on Interbank Islamic Money Market Rate on the principal sum of RM3,857,201.38 with effect from 1 March 2013 until realisation and costs.

[2] The defendants refuted the plaintiff's claim and in its amended defence and counterclaim the defendants amongst others, pleaded that the facility granted to the first defendant was not Shariah compliance as there were no asset sale agreement ("ASA") and asset purchase agreement ("APA") having been executed by both parties after the year 2004. Further, the plaintiff had prematurely terminated the *murabahah* overdraft facility with Account Number 5642583143397, which would only expire on 16 February 2014. In any event, the first defendant had at all times managed the accounts in accordance with the terms of the facility granted to it. The claim for *ta'widh* was misconceived, unreasonable and contrary to the principle of financing premised on Shariah. The plaintiff's action was barred by limitation and there was laches and/or acquiescence on the part of the plaintiff.

[3] Besides that, the plaintiff had also unilaterally reduced the amount granted under the facility and this had caused the first defendant to suffer loss and damages as it was not able to secure the bank guarantee and/or performance bond for various of its projects and/or lost the project it could secure and/or the income it could obtain from these projects.

[4] Therefore, the defendants counterclaimed from the plaintiff for all loss suffered as a result of the plaintiff's actions mentioned herein.

[5] After a full trial with three witnesses having testified for the plaintiff and two witnesses testified for the defendants, I found that the plaintiff had failed to prove its claim on the balance of probabilities and dismissed the plaintiff's claim. Likewise, I found the defendants too had failed to prove their case against the plaintiff on the balance of probabilities and dismissed the defendants' counterclaim. I had also ordered that each party to bear its own costs.

Documents

[6] At the outset of the trial parties have agreed for the following documents to be used:

(i) Bundle of Pleadings	-	"A"
(ii) Common Bundle of Agreed Documents	-	"B1 to B5"
(iii) Issues To Be Tried	-	"C"
(iv) Statement of Agreed Facts	-	"D"
(v) Plaintiff's Opening Statement	-	"E"
(vi) Defendants' Opening Statement	-	"F"

The Issues To Be Tried

[7] For ease of reference the issues as set out in document marked as "C" are reproduced below as follows:

(i) based on the defendants' admission of liability on the overdraft *murabahah* facility what is the amount outstanding under the said *murabahah* overdraft facility?

(ii) whether the *murabahah* overdraft facility have matured and have to be settled despite the fact that there are no asset purchase agreement and asset sales agreement having been executed by the first defendant after the expiry of the asset purchase agreement and asset sale agreement dated 23 December 2004?

(iii) whether the *murabahah* overdraft facility will mature after 2014, ten years after the letter of offer dated 31 July 2013?

(iv) whether the refusal of the first defendant to sign and accept the letters of offer dated 28 May 2009 and 16 July 2009 respectively tantamount to beaches of the agreement relating to the *murabahah* overdraft facility?

(v) whether plaintiff is entitled to vary the terms of the *murabahah* overdraft facility and/or to unilaterally terminate the said facility?

(vi) whether there is an outstanding amount due to the plaintiff under the said *murabahah* overdraft facility?

(vii) whether the plaintiff is entitled to impose late payment charges in the form of *ta'widh* on the outstanding *murabahah* overdraft facility based on rate permitted by the Shariah Advisory Council of Bank Negara Malaysia at the "R" rate or at 1% per annum?

(viii) whether the rate of *ta'widh* based on the "R" rate can be imposed on the outstanding *murabahah* overdraft facility after the said facility had matured?

(ix) whether the plaintiff has the right to unilaterally determine, vary, increase and/or reduce the amount of the facilities granted to the first defendant in view of the fact the transactions involved were premised on the Islamic principle of financing?

(x) in view of the fact that the *murabahah* overdraft facility had been suspended and/or stayed by the plaintiff in 2009, what is the effect of this suspension in relation the date of the maturity of the *murabahah* overdraft facility?

(xi) whether the first defendant suffered loss and damages as a result of the plaintiff's action to unilaterally reduce the *murabahah* overdraft facility?

The Case For The Plaintiff

The Pleadings

[8] The salient points raised by the plaintiff in its pleadings were as follows:

(a) MOD facility under the master facility agreement dated 15 December 2003, Letter of Offer dated 31 July 2003 had been superseded by the facility agreement dated 23 December 2004 and the letter of offer dated 8 December 2004.

(b) The MOD facility was only for one year and the reutilisation of the same was subject to the execution of the new ASA & APA on a yearly basis. The defendants failed to renew the facility agreement dated 23 December 2004 and the same had expired on 22 December 2005.

(c) As the MOD facility had expired on 22 December 2005 the plaintiff was entitled to charge *ta'widh* on the outstanding amount due under the MOD facility. As the date of default commenced on 6 May 2006, *ta'widh* was calculated from this date.

[9] Three witnesses testified for the plaintiff. Based on the evidence that was tendered in court both testimonial and documentary the plaintiff's case could be summarised as follows:

(a) *Vide* a letter dated 31 July 2003 and subsequently additional letters of offer dated 7 August 2003, 25 August 2003, 23 October 2003,

17 November 2003 and 5 January 2004 (see pp. 1 to 22 of "B1" and 279 to 280 of "B2") the plaintiff had granted the first defendant the following facilities:

(i) an Islamic term loan (BBA) of RM2,000,000;

(ii) a *murabahah* overdraft (MOD) of RM3,000,000;

(iii) Islamic bank guarantee (IBG) of RM4,000,000;

(iv) *murabahah* overdraft against progress claim (MOD/PC) of RM5,000,000.

(The first letter of offer ("first LO"))

(c) The first defendant had duly signed these letters of offer. Pursuant to the acceptance of the terms and conditions in the letters of offer the following documents were executed to give effect to these letters of offer:

(i) Master facility agreement dated 15 December 2003 (at pp. 23 to 76 of "B1");

(ii) Facility agreement for Islamic bank guarantee dated 15 December 2003 (at pp. 77 to 120 of "B1");

(iii) Second debenture dated 15 December 2003 (at pp. 23 to 76 of "B1");

(iv) Property purchase agreement dated 15 December 2003 ("BBA") (at pp. 145 to 160 of "B1");

(v) Property sale agreement dated 15 December 2003 ("BBA") (at pp. 161 to 178 of "B1");

(vi) Asset purchase agreement dated 15 December 2003 ("APA") (at pp. 179 to 183 of "B1");

(vii) Asset sales agreement dated 15 December 2003 ("ASA") (at pp. 184 to 189 of "B1");

(viii) Assignments of contracts proceeds dated 15 December 2003 (at pp. 190 to 207 of "B1");

(ix) First party legal charge over property known as HSD 30498-30501 Lot PT 34901-34904 Mukim Klang Selangor (at pp. 223 to 248 of "B2");

(x) Second charge over property known as HSD 30498-30501 Lot PT 34901-34904 Mukim Klang Selangor (at pp. 249 to 274 of "B2");

(xi) General letter of indemnity for banker's guarantee dated 2 January 2004 (at pp. 275 to 278 of "B2"); and

(xii) Two letters of guarantee signed by the second defendant dated 13 December 2003 for RM2,808,306.73 and RM12,000,000 (at pp. 2 to 208 and 49 to 274 of "B1").

[10] It was not disputed that the first defendant had settled all the facilities granted to it under the first LO except the *murabahah* overdraft facility "MOD facility". Under the first LO it was clearly stated that the profit rate for the MOD facility was 8% per annum and the repayment term for the MOD facility was subject to yearly review.

[11] Based on the agreed rate of 8% per annum the parties had complied with the *murabahah* concept facility whereby the parties had executed the ASA and APA dated 15 December 2003 (see pp. 179 to 189 of "B1" ("the first APA & ASA")).

[12] The salient features of the first ASA and APA were as follows:

(a) With respect of the *murabahah* overdraft facility against the progress claim ("MOD/PC") in the aggregate principal amount RM5,000,000 and with respect of the *murabahah* overdraft facility ("MOD") in the aggregate principal amount RM3,000,000;

(b) The bank's purchase price of RM8,000,000;

(c) The bank's selling price of RM8,640.000; and

(d) With respect to the tenure of the MOD facility subject to yearly, review which was to be settled from the date of the first drawdown.

[13] The said facility was restructured pursuant to a letter of offer dated 8 December 2004 (see pp. 295 to 298 of "B2" ("second LO")) and by the terms of the second LO, the plaintiff had agreed to increase the limit of the MOD to RM5,000,000 and the Islamic bank guarantee ("IBG") was reduced to RM2,000,000.

[14] The status of the facilities granted to the first defendant could be as illustrated below:

Facility	Existing Limit	Additional/reduction	New limit
IBF (MOD)	3,000,000.00	2,000,000.00	5,000,000.00
IBG	4,000,000.00	2,000,000.00	2,000,000.00
MOD/PC	5,000,000.00		5,000,000.00
BBA	2,000,000.00		2,000,000.00
Total	14,000,000.00		14,000,000.00

[15] It was the term of the MOD facility for the said facility to be settled in one lump sum payment within 12 months which were agreed to, subject to yearly review. This MOD facility was also subject to the execution of the new ASA and APA (see p. 296 of "B2"). Pursuant to that a facility agreement

dated 23 December 2004 and asset purchase agreement and asset sale agreement dated 23 December 2004 were executed (see pp. 353 to 364 of "B2" (second APA (Bank purchase price - RM5,000,000 & ASA (bank selling price - RM5,400,000).

[16] It was expressly provided that the tenure of the MOD facility was subject to yearly review from date of first drawdown and subject also to the execution of the new APA and ASA. The first LO had superseded by the second LO which provided that the MOD facility was to be settled by one lump sum payment within 12 months financing period subject to yearly review. Hence, the period provided by the first LO had been substituted by the second LO.

[17] The first defendant was informed *vide* a letter dated 14 March 2005 (see p. 365 of "B2") that the restructured MOD facility had been released and will be subjected to annual reduction of RM500,000 each until the limit was reduced to RM3,000,000. The first deduction being on 1 December 2005.

[18] Besides the above the plaintiff had also granted the first defendant the *murabahah* overdraft facility for RM1,000,000, letter of credit (*murabahah*) [LCM] [Local/Foreign/Sight], trust receipt *murabahah* [MTR] [150 days] for the sum of RM8,000,000, bank guarantee [Islamic] [BG-i] [Non-Financial] for the sum of RM5,000,000 making the total sum of RM12,900,000. These facilities granted were pursuant to letters of offer dated 11 July 2006 and 28 July 2006 respectively (see pp. 366 to 383 of "B2") for the purpose of the Al Bidda Project undertaken by the first defendant ("the Al Bidda Facilities").

[19] The Al Bidda facilities were separate from the facility at hand which had been fully settled as the Al Bidda project undertaken by the first defendant at Doha, Qatar had been fully completed. This facility was not relevant for the purpose of the case at hand.

[20] By the plaintiff's letter dated 16 August 2006 the restructured MOD facility was renewed subject to semi-annual reduction of RM500,000 on existing MOD facility to half yearly sinking fund of RM500,000. Other terms in the second LO remain unchanged. The first transaction made by the first defendant would be deemed acceptance to this renewal. In the event the first defendant failed to comply with the condition stated in the above letter the MOD was to be reduced by RM500,000 (see p. 384 of "B2").

[21] *Vide* a letter dated 28 May 2009, (see pp. 398 to 400 of "B2") the second LO was reviewed whereby the plaintiff had restructured the MOD facility by reducing the existing limit under the facility from RM4,500,000 to RM3,500,000 ("third LO"). A new APA & ASA needed to be executed.

[22] The third LO was rejected by the first defendant *vide* its letter dated 12 June 2009 (see p. 402 of "B2"). The first defendant had counter-proposed for the plaintiff to utilise the sinking fund of RM1,500,000 to reduce the MOD facility to RM3,000.000 instead of RM3,500,000 as suggested by the plaintiff *vide* the third LO. Pursuant to another letter dated 30 June 2009, the first defendant had instructed the plaintiff to redistribute the balance sinking fund to be kept under lien to settle the BBA TL monthly instalment with the balance to be refunded to the first defendant's current account.

[23] This resulted in a fourth letter of offer dated 16 July 2009 having been issued by the plaintiff ("fourth LO"). Under the fourth LO the plaintiff had accepted the first defendant's request and the MOD facility was reduced to RM3,000,000 instead of the RM3,500,000 proposed earlier. However the terms in the fourth LO was not accepted by the first defendant as the first defendant was still insisting on the terms of second LO and had demanded that the terms of second LO be adhered to with no new APA & ASA to be executed (see p. 411 of "B2").

[24] This led to an additional letter of offer having been issued dated 7 September 2009 (see p. 413 of "B2"). It was a condition under this additional letter of offer for the first defendant to furnish three guarantors to guarantee the MOD facility.

[25] Even though a reminder letter dated 8 September 2009 (p. 414 of "B2") having been sent, the first defendant had refused to return the duplicate copies of the third, fourth and fifth LOs. By its letter dated 21 April 2010 the plaintiff had informed the first defendant that there was an outstanding amount under the term loan financing and the MOD facility.

[26] By a letter dated 26 April 2010 the first defendant agreed to provide a letter of undertaking to settle the arrears under the term loan facility upon overdraft (Restricted) drawdown from Affin Bank Bhd totalling RM1,300,000. However, with regard to the MOD Facility, the first defendant had disputed the amount stated by the plaintiff. On 13 October 2010 the first defendant had requested the plaintiff to revise the original banking facilities according to the first LO (see pp. 1 to 12 of "B1").

[27] Another letter of offer was issued to the first defendant whereby the plaintiff had agreed to issue the letter of consent/disclaimer for the first defendant further borrowing with Affin Bank Bhd. In addition to that, the plaintiff had agreed to exclude their rights and interest under debenture over the contract proceeds for the project to be financed by Affin Bank Bhd, amongst others:

(a) The first defendant to furnish a letter of undertaking to settle all arrears to date under the BBA Term Financing [BBA TF] upon the contract financing drawdown from Affin Bank Bhd;

(b) Execution of fresh APA & ASA for MOD facility; and

(c) Other terms stated in first, third and fourth LO remained unchanged (see p. 427 of "B2").

[28] The first defendant had by way of a letter dated 14 December 2010 requested for the original terms stated in the fist LO to be reinstated (see p. 429 of "B2").

[29] As both parties could not resolve the issues between them the first defendant had written to Bank Negara Malaysia ("BNM") and BNM had requested the plaintiff to respond to the first defendant's complaint *vide* its letter dated 19 February 2013. The first defendant was not satisfied with the plaintiff's explanation *vide* the plaintiff's letter dated 1 March 2013 and responded that parties should resolve the matter in court (see p. 441 of "B2").

[30] The plaintiff maintained its stance against the first defendant and pursuant to its letter dated 6 June 2013 plaintiff notified the first defendant the outstanding amount and *ta'widh* due and outstanding from the first defendant to the plaintiff. A statement of account showing the full outstanding amount and *ta'widh* was also furnished to the first defendant (see p. 452 of "B2").

[31] This issue was to be decided to be resolved in this suit before me.

[32] This had led to an action having been filed by the first defendant against the plaintiff *vide* Civil Suit No. 22M-2-03/2013 which was withdrawn subsequently with liberty to file afresh. There was also a consent order recorded between the first defendant and the plaintiff on 27 March 2013 wherein the first defendant admitted liability to pay the MOD facility but disputed the amount outstanding.

[33] It could be gauged from the plaintiff's pleadings that the terms of the MOD facility under the master facility agreement dated 15 December 2003, letter of offer dated 31 July 2003 had been superseded by the facility agreement dated 23 December 2004 and the letter of offer dated 8 December 2004.

[34] The MOD facility was only for one year and the reutilisation of the same was subject to the execution of the new ASA & APA on a yearly basis. The defendants failed to renew the facility agreement dated 23 December 2004 and the same had expired on 22 December 2005. As the MOD facility had expired on 22 December 2005 the plaintiff was entitled to charge *ta'widh* on the outstanding amount due under the MOD facility. As the date of default commenced on 6 May 2006, *ta'widh* was calculated from this date.

Case For The Defendants

The Pleadings

[35] Facts which were pleaded in the amended defence and counterclaim could be briefly stated as follows:

(a) The facility agreement dated 23 December 2004 together with the letter of offer dated 8 December 2004 were supplemental to the master facility agreement dated 15 December 2003 together with the letter of offer dated 15 July 2003.

(b) The terms contained in the master facility agreement and the letter of offer dated 31 July 2003 were still valid and binding and not superseded by the facility agreement.

(c) The tenure of the MOD facility under the master facility agreements was for ten years from the date of the first drawdown from the designated account whereas the RM2,000,000 facility under the letter of offer dated 8 December 2004 is to be reduced by RM500,000 annually with effect from 8 December 2005.

(d) The 'additional yearly reductible' RM2,000,000 MOD facility *vide* the facility agreement dated 23 December 2004 to be read with the letter of offer dated 8 December 2004 was to be reduced by RM500,000 annually starting from 23 December and expired on 23 December 2008.

(e) The MOD facility was not due and owing to the plaintiff. Therefore, the plaintiff's claim of *ta'widh* was ill founded.

(f) The MOD facility and the unilateral reduction of the Islamic banking facilities in 2009 were in breach of the basic Shariah principle.

(g) The unilateral reduction of the facilities had continued to harm, and cause irreparable damages and losses to the defendants.

(h) Within the Shariah framework of financing there must be transparency and mutual agreement for any facility agreement to be valid.

(i) The MOD facility was to be fully settled on the tenth year from the date of the first drawdown.

(j) The profit rate for the MOD was 8% per annum on the utilised amount.

(k) The plaintiff's claim was barred by virtue of s. 6 of the Limitation Act 1953.

[36] The facts leading to the case and the counterclaim could be stated as follows:

(a) The facts, which were laid down in paras. 9 to 14 under the heading 'The plaintiff's case' were not really in dispute;

(b) The plaintiff's claim against the defendants was premised on the MOD facility. Under the MOD facility, the plaintiff as the financier undertook to acquire a specific asset from the vendor or supplier based on the customer's specification and subsequently sells the asset to the customer with the full disclosure of the asset's acquisition costs and profit margin;

(c) The above is inherent in the MOD. Therefore, it is crucial to examine the facts in this case to see if the MOD facility adopted by the plaintiff in this case was in line with the basic principle of Shariah;

(d) The plaintiff was not entitled to claim the above-mentioned amount from the defendants, as under the principal loan facility agreement, the *murabahah* overdraft facility was due only on February 2014;

(e) The plaintiff's reliance on any subsidiary loan agreement to initiate this action was ill founded and/or misconceived and contrary to the principal loan facility agreement;

(f) The unilateral deduction of the loan facility by the plaintiff was unlawful and in breach of the principal loan facility agreement; and

(g) Due to the unilateral reduction and calling back the *murabahah* overdraft facility before the maturity date, the defendants had suffered irreparable damages and losses amounting to RM3 million per annum from 2009 or any amount the court deemed fair and just in return of the assets forfeited and denied from the defendants. The plaintiff had also sought for general and exemplary and aggravated damages to be assessed by this court and costs.

Issues Raised By The Plaintiff And Defendants

For The Plaintiff

[37] Learned counsel for the plaintiff, amongst others, raised the following arguments:

(a) The MOD was premised on the *murabahah* concept of financing whereby the plaintiff was to buy the asset and sell back this asset to the first defendant on the cost price plus financing/profit.

(b) Pursuant to this concept of financing it was the plaintiff's intention to grant the MOD based on yearly review. This had been proven by the fact that the plaintiff had fixed the bank selling price ("SP") at RM8,640,000 calculated based on 8% per annum profit rate (see p. 189 of "B1") which was agreed under the first LO. The cost price of RM8,000,000 plus Financing/Profit of RM 640,000 (RM8,000,000 x 8% per annum) which was equivalent to RM8,640,000 ("SP").

(c) The first LO had been superseded by second LO dated 8 December 2004 (see p. 296 of "B2"). Pursuant to second LO dated 8 December 2004 (see p. 295 of "B2") the MOD was increased to RM5,000,000. It was

provided that this sum was to be paid within 12 months financing period subject to yearly review. This sum could be utilised by the plaintiff upon the execution of a new APA and ASA to be executed. The second LO was in respect of the total RM5,000,000 and not restricted to the increased sum of RM2,000,000.

(d) This was strengthened by the fact that the parties had executed the second APA and ASA (see pp. 353 to 364 of "B2") and the SP for the said MOD was RM540,000,00 which tenure shall be subjected to yearly review to be settled fully from the first drawdown (see p. 364 of "B2"). Therefore, it was not the intention of the plaintiff that the MOD shall be fixed for ten years. Further both first LO and the second LO had expressly provided for the SP to be calculated based on one year profit only. Further, both parties must execute new APA and ASA in order to give effect to the restructured MOD.

(e) The plaintiff had complied with all the elements of the financing premised on the *murabahah* concept and reiterated that as a financial institution its intention was to gain profit and without the execution of a new APA and ASA the whole concept of financing premised on the *murabahah* concept would collapse.

(f) As the MOD facility had been restructured, the period stated in the first LO would not be applicable and had been superseded by the period stated in the second LO, which was 12 months, and not as stated in the first LO. As the plaintiff was vested with the absolute discretion under the facilities agreement to vary the terms of the master facility agreement, the plaintiff could vary the said term unilaterally (see cl. 14.20 at p. 59 of "B1"). Therefore, the terms of the second LO would be binding on the plaintiff and the defendants.

(g) The plaintiff was therefore entitled to demand for the repayment of the outstanding amount under the MOD on its maturity 12 months upon the expiry of the APA and ASA.

The Terms Of The APA And ASA Were Clear And Unambiguous

[38] It was the contention of the plaintiff that the terms of second LO were clear and explicit that the plaintiff had intended for the MOD to be settled within 12 months from the date of the first drawdown reinforced by the following fact:

(a) If the plaintiff had intended or the MOD facility to be settled within ten years from the date of the first drawdown as contended by the defendants the calculation of the SP would have been shown on the APA and ASA.

(b) The SP was computed at 8% per year, which gave the profit of RM240,000 per year. This would be subject to fresh APA and ASA having been executed after the lapse of the one year period. This clearly showed that from the outset the tenure of the MOD facility would have been one year and not ten as understood by the defendants.

(c) Further, it was expressly stated in cl. 2.3 of the ASA dated 23 December 2004 (see p. 306 of "B2") under s. 6 the duration of the MOD facility shall be subjected to yearly review.

(d) Based on the facts surrounding this case as well as the reading of the first LO and the second LO and all the relevant contemporaneous documents, the proper and reasonable construction of the terms would be based on a yearly review and upon execution of fresh APA and ASA. Based on this too the plaintiff was entitled to *ta'widh*.

Plaintiff Entitled To Sums Claimed And *Ta'widh*

[39] Pursuant to its SOC the plaintiff claimed from the defendants the following:

(a) The sum of RM4,599,016.37 being the amount due and outstanding under the MOD facility as at 28 February 2013;

(b) The plaintiff had also claimed for late payment charges and/or *ta'widh* to be calculated based on the "R" rate from 6 May 2006 to 30 June 2012 and IIMM rate from 1 July 2012 to 28 February 2013 and this calculation was based on the sum of RM3,857,201.38; and

(c) Costs.

[40] As there was no new APA and ASA executed upon the maturity of the MOD on 5 May 2006, the principal amount would be RM3,906,377.11. The plaintiff had chosen this date as this was the last date the plaintiff could earn the full profit under the MOD facility in respect of the RM640,000. Hence, *ta'widh* was charged from 6 May 2006 to 30 June 2012 and from 1 July 2012 up to 28 February 2013 respectively. The plaintiff had relied on the Bank Negara Malaysia Guideline on *ta'widh* (see pp. 894, 897 and 898 of "B5"). The total sum in respect of *ta'widh* was the sum of RM2,064,488.71.

[41] According to the plaintiff, it had proven by way of its statement of account, which was conclusive that the defendants owed the plaintiff the sum as mentioned in the preceding paragraph (see pp. 604 to 608 of "B3"). The said sum as stated in the statement of account is conclusive evidence of the plaintiff's indebtedness pursuant to cl. 14.1 of the facility agreement (see p. 331 of "B2").

There Was No Waiver With Regard To Ta'widh

[42] The plaintiff did not claim for *ta'widh* in the year 2006 and this did not amount to a waiver on the part of the plaintiff:

(a) The plaintiff did not make any demand for *ta'widh* in 2006 due to the reason that there was unutilised profit under the MOD/PC, which was transferred to the MOD facility account. This was to assist the first defendant to regularise its accounts.

(b) Despite that, there was no demand from the plaintiff for *ta'widh*, the first defendant could not claim that this was some kind of a waiver as parties had agreed under cl. 14.3 of the master facility agreement for a waiver to be effective there must be express waiver in the form of writing. In this case, these was none.

(c) Hence, despite the same had not been claimed by the plaintiff earlier it did not mean that the plaintiff could not claim it at his stage.

Whether Ta'widh Could Be Charged Retrospectively

[43] The plaintiff contented that as it could not generate profit from the MOD Facility as the first defendant had refused to execute the new APA and ASA the third LO gave the right to the plaintiff to charge *ta'widh*. Further, there was nothing in the BNM Guidelines to state that the plaintiff could not charge *ta'widh* retrospectively. As there was no notice in writing sent to waive *ta'widh* as provided under clause cl. 17 of the first LO the plaintiff had every right to claim *ta'widh*.

There Was Continuous Default By The First Defendant

[44] In line with the *murabahah* facility, the plaintiff had issued the third LO dated 28 May 2009 (see pp. 398 to 400 of "B2") for the first defendant to execute fresh APA and ASA but the first defendant had refused to do so. In view of the first defendant's refusal to execute the fresh APA and ASA, the plaintiff was not able to comply with the *murabahah* concept of financing. The first defendant had made it impossible for the plaintiff to disclose the marked up price consisting of its profit margin for the purpose of the *murabahah facility*, without which the plaintiff could not claim for profit under the MOD facility.

[45] The defendants had breached its obligations under the MOD and there existed an events of default. Therefore, the defendants' conduct in not complying with the plaintiff's request tantamount to a deliberate attempt by the defendants to evade the contractual obligations under the MOD Facility. The plaintiff contented that in view of the defendants' action it was justified in terminating the MOD facility and demanding for the whole some outstanding plus *ta'widh* from the first defendant, as the principal borrower, and the second defendant as the guarantor.

Whether The Defendants Was Entitled To The Counterclaim

[46] In response to the defendants' counterclaim, the plaintiff contented the following:

Whether the plaintiff can vary the term of the contract unilaterally.

(a) It was the contention of the defendants that the plaintiff had no right to vary the terms of the contract unilaterally. Under cl. 2.8 of the master facility agreement (see p. 33 of "B1") and the facility agreement, (see p. 308 of "B2") the plaintiff had the right to review and renew the said facilities. This was further reiterated in cl. 4 under the general terms and conditions of the first LO and cl. 6 of the second LO (see pp. 7 of B1 and 297 of "B2").

(b) This was also provided under master facility agreement (clause 14.20 at p. 59 of "B1") and the facility agreement (cl. 14.20 at p. 335 of "B2"). All the above provisions clearly stated that the plaintiff had the absolute discretion to vary the terms of the contract.

(c) The first defendant's refusal to sign the new APA and ASA under the third LO tantamount to breach of contract which entitled the plaintiff to vary the terms of the contract.

(d) The plaintiff's action to review the terms of the contract were well within the full knowledge of the first defendant as the defendants were involved with the discussions.

Restriction On The Debenture

[47] The first defendant had also executed a debenture dated 15 December 2003 as a security for the facilities (see p. 121 of "B1") where the first defendant had agreed the debenture in favour of the plaintiff by way of a fixed charge over all present and future assets of the first defendant as well as floating charge on all of the first defendant's asset under s. 3.1 of the debenture (see p. 125 of "B1").

[48] The first defendant's had failed to justify its claim that the plaintiff's action in refusing to issue the letter of waiver had resulted in the first defendant suffering loss of profit. The defendants' witness in court had testified that at least three waivers were given to the first defendant. The first defendant had not adduced evidence to support its contention that as a result of the plaintiff's action in reducing the limit of the MOD facility it had suffered irreparable damage and loss of profit.

[49] The first defendant's contention that the value of the security was much higher than the facilities granted to the first defendant. Therefore, the plaintiff would not be any way prejudiced in the event the waiver was granted to the first defendant. Further, the first defendant was more active with their overseas project which did not require 'performance bond' to be furnished.

Whether or not the value of the security was higher than the amount of the facilities did not actually affect the plaintiff's right to grant the waiver or otherwise to the first defendant.

[50] Based on the aforesaid the first defendant's claim that it suffered loss was unsubstantiated and without merits.

The Underlying Asset

[51] With regard to the first defendant's claim that the same asset was used in respect of the APA and ASA the plaintiff contended that under the Islamic concept of financing the same asset could be used as once the APA and ASA had been completed the transactions were deemed to be completed as what was left in respect of these transactions were the debt and/or 'Dayn'. This principle of financing was based on the *Bai'inah* concept.

Damages

[52] The plaintiff claimed that on the totality of the evidence before this court the first defendant had failed to discharge the onus to prove that it had actually suffered losses. Therefore the first defendant's claim for damages must fall.

[53] In view of the above, the plaintiff contented that it had discharge the burden placed by the law in proving its case on the balance of probabilities and prayed that its claim be allowed and the counterclaim be dismissed with costs.

For The Defendants

[54] Learned counsel for the defendants raised, amongst others, the following arguments:

(a) The plaintiff had violated the basic tenets of the *murabahah* contracts in the master facility agreement dated 15 December 2003 and the Al Bidda Tower Facility Agreement dated 11 July 2006. The total amount with respect to the Islamic financing was the sum of RM26,900,000.

(b) Further, the plaintiff had intentionally reduced the facility amount for the executed ASA for RM3,000,000 and the APA RM4,500,000. By doing so, the plaintiff stood to benefit 50% profit.

(c) It was not disputed that the MOD under the master facility agreement dated 15 December 2003 was premised on the APA and ASA on the assets belonging to the first defendant known as HSD 30498-30501 Lot PT 34901-34904 Mukim Klang.

(d) Therefore, the defendants contended that there was breach of the *murabahah* concept of financing as stated in the BNM Guidelines. In the case before this court, the *murabahah* contract was executed reversely wherein the first defendant sold its own asset and re-purchase the same

at a marked up price. The normal feature of the *murabahah* contract was the transfer of the ownership of the asset from the seller to the purchaser. The asset too must be in existence and owned by the seller. The ownership of the *murabahah* asset must be transferred from the seller to the purchaser.

(e) All the features of *murabahah* contracts were not prevalent in the case at hand. In fact, the transactions herein were not a sale of an asset owned by the plaintiff but a buy back of a property owned by the first defendant. The defendants contended that such an arrangement is prohibited in Islam.

(f) Despite the contradictions with the *murabahah* contract, the plaintiff proceeded with the execution of the contract. Therefore, the ASA and APA executed were null and void, invalid and had grossly infringed the basic tenets of the Islamic principle of financing. The defendants further contended as follows:

(i) the APA and ASA executed on 23 December 2004 was for the same assets that were the subject matter of the ASA and APA dated 15 December 2003;

(ii) the ASA and APA were for assets already owned by the first defendant;

(iii) the first ASA had not been fully settled when the new fresh APA was executed;

(iv) the purchase and resale of the asset to the first defendant to reschedule the financing involved the same asset as the master facility agreement dated 3 July 2003;

(v) the above transactions entered into were prohibited as it involved the same asset even though the facility was available to the full tenure; and

(vi) as such the facility agreement, the ASA and APA executed on 23 December 2004 were null and void and of no effect.

[55] The additional MOD facility dated 11 July 2006 granted to the first defendant was in respect of the sum of RM1,000,000 for MOD/PC and the very same asset owned by the first defendant was used despite the earlier financing had not been fully settled. Hence this MOD facility was also void and null and of no effect.

[56] Despite the transactions entered into were tainted with illegality as the plaintiff had not complied with the *murabahah* concept of financing, the plaintiff again requested the first defendant to execute a new ASA and APA using the same asset owned by the first defendant. Therefore, the entire *murabahah* facility was null and void.

[57] The proposed ASA and APA to be entered for the purpose of the implementation of the 2009 MOD was unilaterally done and lacked the essential element of consent on the part of the first defendant which is the key element to a valid contract premised on the Islamic concept of financing.

[58] Due to the fact that there no mutual consent of the parties to the proposed *murabahah* facilities the whole contract premised on the Islamic concept of financing must collapse.

[59] The defendants further contended that the master facility agreement was not superseded by the second LO and the facility agreement dated 23 December 2004 but formed an integral part of the second LO and the facility agreement dated 23 December 2004.

[60] Even the terms of the second LO and the facility agreement dated 23 December 2004 provided for all other existing terms if not amended and or varied remained good and valid. Further, the facility agreement dated 23 December 2004 was made pursuant to the master facility agreement. Hence, the terms of the master facility agreement were still valid and remained binding.

[61] The first defendant further contended that the facility agreement dated 23 December 2004 were only in respect of the additional RM2,000,000 MOD making the total MOD granted to the first defendant amounting to RM5,000,000 with the profit margin of RM400,000.

[62] Pursuant to the MOD facility the additional RM2,000,000 was to be reduced by RM500,000 annually with effect from LO2 until the MOD amount remained at RM3,000,000. This MOD would have been fully reduced by 2009 whilst the RM3,000,000 MOD facility which was granted under the first LO remained intact and would only be payable on the tenth year from the first drawdown date.

[63] The defendants contended that the plaintiff's allegation that the entire MOD facility was only for one year could not be sustained due to the following reasons:

(a) The RM3,000,000 MOD facility under the master facility agreement dated 15 December 2003 was for a period of ten years which was to be settled on the ten year from the first drawdown;

(b) The 23 December 2004 facility agreement did not supersede the master facility agreement but merely supplemented it.

(c) With respect to the additional RM2,000,000 MOD Facility there was an express term in the second LO which stipulated that this amount would be reduced by RM500,000 annually with effect from 8 December 2005 and was to expire on 8 December 2008.

(d) As terms in the master facility agreement and the facility agreement contained contradictory terms, these documents must be interpreted in favour of the defendants who were not the drafters of these documents. The *contra proferentum* must apply in favour of the defendants.

(e) As to whether the MOD was for a period of one year or otherwise, one had to examine the intention of the facility:

(i) the facility involved a long term project undertaken by the first defendant. Obviously the facility would have to cater for defects liability period which would be around two years;

(ii) the IGB Facility was for a period of eight years. Therefore the facility must be longer than one year as contended by the plaintiff;

(iii) the first LO had made express provision for the tenure to be paid ten years from the first drawdown;

(iv) the plaintiff had not at any time informed the first defendant of the error on first LO and this was brought to light only during the trial; and

(v) the 2006 Facility provided for a term of five years. This would further reinforce the defendants' claim that the MOD Facility under the master facility and the facility agreement was for a term exceeding one year.

[64] Based on the aforesaid the only reasonable conclusion one could make was that the tenure of the MOD could not be one year. Another reasonable conclusion was the MOD was that there were in fact two MOD facilities, one for RM3,000,000 and another for RM2,000,000.

[65] The MOD facility amounting to RM2,000,000 had been fully settled by way of funds procured from the Al Bidda project.

Whether Plaintiff Entitled To Impose Ta'widh

[66] The defendants maintained that by their arguments set out above the plaintiff was not justified in imposing *ta'widh*. The plaintiff had failed to establish that there was wilful default and or neglect on the part of the first defendant.

[67] The defendants claimed that the first defendant did not commit any wilful defect or neglect to warrant imposition of *ta'widh*. Neither was there any letter from the plaintiff to the defendants giving notice to the first defendant of any event of default and or neglect between the years 2006 to 2009. This fact was even admitted by PW1 in her testimony in court during cross-examination.

[68] The plaintiff's claim for *ta'widh* was not supported by evidence and based on wrong computation. There was also elements of double counting, sums taken into consideration were inclusive of the wrongful profit, *ta'widh*

was charged retrospectively, *ta'widh* was based on "R" rate for a long time and then the IIMM rate. The plaintiff had failed to prove by way of documents how the *ta'widh* was calculated as the actual workings of the calculation were not tendered in court.

[69] In view of the above, the defendants submitted that the plaintiff's action to charge *ta'widh* was not justified and ought to be rejected by this court.

Counterclaim

[70] The counterclaim of the first defendant was premised on the plaintiff's action to reduce the facility amount by RM8,400,000 which the first defendant claimed was done unilaterally. At no time did the first defendant request for the same to be reduced. Further, there was no valid reason given as to why the said facility had been reduced unilaterally. This again had infringed the basic principle of financing premised on Islamic concept as it lacked the element of mutual consent.

[71] By insisting that the first defendant to execute the new ASA and APA with the amount of the MOD having been reduced unilaterally by RM8,400,000 to RM5,470,544.30 based on the plaintiff's own policy consideration had resulted in the first defendant's suffering irreparable damage and harm to the first defendant making it impossible even for the first defendant to tender for projects in Malaysia and outside Malaysia.

Burden Of Proof

[72] It is trite that the person who asserts the existence of certain facts must prove those facts exist (see s. 101(1) of the Evidence Act 1950). The principles within which this court should be guided in disposing a case after a full trial had been laid down in a number of authorities as follows:

(a) In the Malaysian case of *Selvaduray v. Chinniah* [1939] 1 LNS 107; [1939] MLJ 253, the court held that onus of proof was on the plaintiff to prove his case and that, if the position at the conclusion of the trial being exactly even, the plaintiff had not discharged the onus, which was on him and his action must fail.

(b) In *Chow Kay Kong v. Ching Tong & Ors* [1967] 1 LNS 30; [1967] 2 MLJ 31, the Federal Court held that where the evidence on both sides was so evenly balanced that the judge had to look for evidence elsewhere to decide the issue, it is abundantly clear that the appellant had failed to discharge the onus of proof, which rested on him as the plaintiff.

(c) In *Eastern Enterprises Ltd v. Ong Choo Kim* [1969] 1 LNS 35; [1969] 1 MLJ 236 Winslow J held at p. 244 as follows:

> I accordingly find that the plaintiffs have not discharged the burden of proving a case against the defendant in the first place.

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> No burden accordingly shifts to the defendant ... **the defendant would not have to disprove something which has not been proved against him**. (emphasis added)

(d) In *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229 for instant His Lordship Chang Min Tat FC said:

B

> Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

(e) In *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 at pp. 116-117 which was approved by the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1 the Court held:

C

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. **He must when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria**. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. **If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case**. A trier of fact who makes findings based purely upon demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: **the approach to judicial appreciation of evidence is the same**." (emphasis added)

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Decision Of This Court

[73] After considering the evidence before me, both testimonial and documentaries, having perused the written submissions of both parties filed herein and upon hearing learned counsel for the plaintiff and the defendants my decisions are as follows.

G

The Murabahah Concept Of Financing

H

[74] Before I delve into the findings, it is pertinent for me to state briefly the salient features of a *murabahah* concept of financing which was adopted in the case at hand as follows:

(a) *Murabahah* refers to a sale and purchase of an asset where the acquisition cost and the mark-up are disclosed to the purchaser.

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(b) The asset must be already in existence and owned by seller before the sale takes place.

(c) In an ordinary *murabahah* the seller buys the asset without relying on any prior promise to purchase or to sell or without a purchase undertaking or sale undertaking.

(d) However, in the *murabahah* to the Purchase Orderer (MPO) the promise to purchase the asset is permitted.

(see *Murabahah* Policy Documentation issued by Bank Negara Malaysia on 23 December 2013, Principles and Practices of Shariah in Islamic Finance (Shariah Parameter Reference 1 *Murabahah*); Islamic Financial System Principles for Operations by International Shariah Research Academy for Islamic Finance at p. 205)

The Transactions At Hand Violated The Murabahah Concept

[75] From the summary outlined above the following could be observed:

(a) The *murabahah* transaction in this case was an ordinary *murabahah*;

(b) The *murabahah* contract was executed reversely where the first defendant sold its own asset and repurchase the very asset at a mark-up price;

(c) The MOD under the master facility agreement dated 15 December 2003 was based on ASA and APA on the asset already owned by the first defendant known as HSD 30498-30501 Lot PT 34901 Lot PT 34901-34904 Mukim Klang, Selangor;

(d) The transaction did not involve a sale of the asset owned by the plaintiff but a buy back of the asset owned by the first defendant;

(e) The plaintiff had not complied with the *murabahah* concept of financing for the following reasons:

(i) the transaction did not involve the transfer of ownership of asset from the seller to the purchaser which is a common feature inherent of the sale contract;

(ii) the transaction lacked the features that it must be an asset already in existence and owned by the seller;

(iii) there was no actual transfer of the *murabahah* asset from the seller to the purchaser;

(iv) there was non disclosure of acquisition cost;

(v) a reading of cl. 1 of the first and second ASA and APA there was an undertaking for resale of asset;

(vi) from the facts as outlined above it could be seen that the master facility agreement dated 15 December 2003 and the facility agreement dated 24 December 2004 had not complied with the basic tenets of *murabahah* concept of financing as illustrated above.

[76] It was also observed that the MOD Facility dated 23 December 2004 had also breached the *murabahah* concept of financing due to the following:

(a) The asset in respect the ASA and APA of this MOD Facility was the same asset in respect of the ASA and APA of first MOD Facility;

(b) This asset was already owned by the first defendant; and

(c) The purchase and resale of the assets to the first defendant to reschedule the financing involved the same asset as the master facility agreement dated 15 December 2003 read together with the first LO.

[77] The purchase and resale of the said assets is prohibited as it involved the same asset. As this was prohibited under the Shariah principle of financing this MOD facility too was null and void and of no effect.

[78] I had illustrated above at paras. 21 to 26 that the plaintiff had in fact unilaterally revised the MOD facility and had in fact forced the first defendant to execute a fresh ASA and APA using the very same asset (see pp. 398 to 400 of "B2"). This was done after the lapse of the second ASA and APA on 23 December 2005. Between 23 December 2005 to 28 May 2009 there was no fresh ASA and APA executed. The first defendant had refused to accept the plaintiff's offer which had caused the amount of the MOD facility having been reduced substantially as shown in the preceding paragraph. The first defendant claimed that this in itself had breached the very tenet of the *murabahah* financing in general and or the Islamic concept of financing which must be based on mutual consent of the contracting parties. This essential element was lacking in terms of the revised MOD facility, which was unilaterally revised by the plaintiff. Therefore, it was void and unenforceable.

[79] For all intent and purposes mutual consent is a key element in all financing premised on the Islamic concept of financing. All transactions between the contracting parties are based on mutual consent or at least the consent of the person who imposes on himself a condition. This principle is supported by the following:

(a) The Verses of the Holy *Qur'an Surah an-Nisa*' 4:29 which states:

> O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent. And do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you.

(b) The hadith narrated by Abu Hurayrah:

> When Abu Zuhrah made a business transaction with a man, he gave him the right of option. He then would tell him: Give me the right of option (to annul the bargain). He said: I heard Abu Hurayrah say: The Apostle of Allah (PBUH) said two people must separate only by mutual consent.

(c) Abu Hurairah al-Raqasshi from his uncle reported that the Messenger of Allah said:

> "Behold! Opress not. Behold! The property of a man is not lawful except with his voluntary consent."

(d) According to Ibn Hajr, there is a narration from Ibn Sirin who mentioned about a potential customer who said to the owner of some animals for hire: "Prepare for me one of the animals. Should I not hire it on such a date, I will pay you 100 dirham." Apparently, the customer did not proceed with the deal, and so, according to Qhadi Syuraih: "Whoever imposes a condition upon himself voluntarily, then that condition is binding." (see *Al-Sayuti, A-Sybah Wa al-Nazair*, p. 83-84 in BNM, *Shariah Resolutions in Islamic Finance*, p. 26).

(e) The legal maxim - the general principle conferring validity of contracts is the consent of both parties, and the effective terms and conditions are what are agreed. The maxim provides a contract is valid and binding only when there is mutual consent given freely so long as it should not contradict Shariah. The terms of the contract too must be agreed upon freely (see Mohamad Akram Laldin and Others, *Islamic Legal Maxims and Their Application in Islamic Finance* (Kuala Lumpur: ISRA, 2013), p. 26).

[80] Premised on the above high authorities, it is observed that mutual consent is required on the terms of the agreement, and further consent is required for the lawful appropriation of property. From the above authorities the customer such as the first defendant in this case is protected under the Islamic financing concept not to accept the inequitable imposition on him the new unilateral ASA and APA which was forced on to him by the plaintiff.

[81] In applying the above-mentioned principles and maxims to the case at hand, I am of the view the plaintiff is prohibited from enforcing its rights, which clearly violated the basic tenets of financing premised on the Islamic concept of financing. Therefore the restructuring and rescheduling of the MOD Facility was a usurpation/'ghasab' by the plaintiff as the plaintiff did not obtain the mutual consent of both the contracting parties.

Whether The Issue Of Liability Resolved Pursuant To The Consent Judgment

[82] The court was informed by the respective party at the outset that in respect of the case at hand there was already a consent judgment recorded in terms of liability relating to the MOD facility and what was left was for the plaintiff to prove the quantum during the trial.

[83] It was the plaintiff's contention that the issue of liability could not be ventilated, as the matter has been resolved *vide* the consent judgment dated 27 March 2013 ("CJ"). Therefore it was not opened to the defendants to raise the issue of illegality as the defendants had agreed to enter into the CJ in

terms of liability and what was left to be ventilated before this court was the issue of quantum (see pp. 885 to 886 of "B4"). Citing the case of *Perwira Habib Bank (M) Bhd v. Penerbitan ASA Sdn Bhd & Ors* [1997] 1 LNS 229; [1998] 5 MLJ 297 the plaintiff claimed that the doctrine of estoppel would apply to the factual matrix of this case.

[84] Further pursuant to O. 27 r. 3 of the Rules of Court 2012 an admission of fact made by a party to a cause or matter either by pleadings or otherwise shall render the court to give judgment in respect of that admission. Therefore, the plaintiff contended that the defendants were estopped from raising the issue of liability as this had been admitted *vide* the CJ entered into between both the plaintiff and the defendants.

[85] The defendants on the other hand submitted that the plaintiff was prohibited from relying on a contract that is prohibited by Shariah. As the *murabahah* contract was, illegal as shown above I am of the view that despite the CJ having been executed it did not mean that this court had no jurisdiction to decide on the issue of illegality. Learned counsel submitted that pursuant to s. 24 of the Contracts Act 1950, the *murabahah* contract was null and void and unenforceable against the defendants due to illegality.

[86] I am of the view that once the issue of illegality had been established this court is vested with the jurisdiction to deal with the matter despite the fact that the same was not pleaded in the pleadings. The principle that the court ought not to enforce an illegal contract if the illegality is duly brought to the notice of the court would be applicable.

[87] Guided by a plethora of cases, some of which are cited below, I am of the view that the issue of illegality can be raised at any time and the court must take cognisance of this illegality not withstanding that the same had not been pleaded by the defendants herein.

(see *Mustafa Osman v. Lee Chua (P)* [1996] 3 CLJ 494; *Natha Singh v. Syed Abdul Rahman & Anor* [1962] 1 MLJ 265; *Nasib Singh v. Ramasamy* [1968] 1 LNS 85; [1969] 1 MLJ 211)

[88] In *Nasib Singh v. Ramasamy (supra)* the learned judge held as follows:

> In my view the Court, is bound, once it knows that the contract is illegal, itself to take the objection and to refuse to enforce the contract .... the court does not sit to enforce illegal contracts. There is no question of estoppel; it is for the protection of the public that the Court refuses to enforce such a Contract."

[89] In *Mustafa Osman v. Lee Chua & Anor (supra)* the court held as follows:

> (1) Illegality need not be specifically pleaded, and that once the illegality is brought to the attention of the Court before whom the action is being tried, the Court, upon being satisfied that the transaction is indeed illegal, is obliged to act upon it.

[90] The same principle was enunciated in *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1; [1989] 1 MLJ 457 where it was held that even though the same had not been pleaded the court must take notice of the illegality as "no court could be a party to the enforcement of an unlawful agreement". A

[91] For the case before me, it is observed that the *murabahah* concept of financing was adopted but it was a camouflaged in the form of *Al Bainah* rendering the contract entered into between the plaintiff and the defendants null, void and unenforceable. B

[92] A perusal of the documents and on examining the testimony of witnesses in court it would appear despite labelling the MOD Facility as *murabahah* based contract the conduct of both parties showed that parties to the agreement were treating the contract as a conventional transaction. Despite the fact that there was no ASA and APA having been executed the amount under the MOD facility was released to the first defendant and the same had been accepted happily by the defendants to meet the first defendant's financial obligations. C D

Plaintiff's Claim Barred By Limitation

[93] Notwithstanding what I had stated above, I am also of the view that the plaintiff's action against the defendants was barred by limitation. The plaintiff contended that the default had occurred at the time the first defendant had refused to execute the new ASA and APA after the second ASA and APA had lapsed. By its own admission, the plaintiff had asserted that the MOD facility had matured on 5 May 2006. In view of the above, the plaintiff's cause of action against the defendants would have arisen and or accrued on or by 5 May 2006. This action having been filed on 23 April 2013 was beyond the statutory provision of six years provided under s. 6 of the Limitation Act 1953. On this ground alone, the plaintiff's action against the defendants ought to be dismissed by this court. E F

There Were Laches And Acquiescence G

[94] The plaintiff was also claiming for late payment charges and/or *ta'widh* from 6 May 2006 to 30 June 2012 based on "R" rate and from 1 July 2012 at IILM rate as permitted by Bank Negara Malaysia. The amount of *ta'widh* claimed by the plaintiff was quite substantial, reaching the sum of about RM2,000,000. From the evidence that was adduced during the trial, it was not disputed that the plaintiff had not notified the defendants of its intention to charge *ta'widh* in respect of MOD facility. The first of such notice was dated April 2013. It was in evidence that from May 2006 until April 2013 the plaintiff had not served any notices of default to the defendants. In fact, no such notices were tendered as evidence during the trial. Even the plaintiff's key witness, PW1 admitted there were no notices H I

of default having been sent to the defendants to claim *ta'widh* and or any amount under the MOD facility. The 100 monthly statements issued to the first defendant made no mention of the *ta'widh* to be charged.

[95] According to the plaintiff there was no demand made in respect of *ta'widh* because there was unutilised profit under the MOD/PC, which had been transferred to the MOD facility account. During re-examination of PW2, the plaintiff contended that it had wanted to assist the first defendant to regularise its account. I am of the view by its action to claim *ta'widh* retrospectively for a period of for almost seven years was definitely against the spirit and intent of the financing, which was premised on Islamic concept. The plaintiff had in fact slept on his rights. It was unethical and un-Islamic and inequitable for the plaintiff to act in such a manner. This conduct was held to be equivalent to a waiver (see the case of *Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202).

[96] By its conduct, the plaintiff was obviously guilty of laches and or acquiescence. Further estoppel would work against the plaintiff. By the plaintiff's conduct in this case, the plaintiff had given the impression that it would not be pursuing its claim for *ta'widh* having abandoned the claim earlier and then pursuing the same after seven years would not be equitable to the defendants. Lapse of time and delay in prosecuting a claim against the defendants herein would justify the defendants to raise laches and or acquiescence to deny the plaintiff of the sums claimed. That being the case it is unjust and inequitable for the plaintiff to claim the same *vide* this action.

[97] It would appear the plaintiff were imposing its own rules on the defendants by importing the features of conventional loans and or financing on the financing premised on Islamic principle, such as this, where the elements of mutual consent and understanding were pertinent.

The Plaintiff Had Not Proven Its Claim

[98] Before the plaintiff could charge *ta'widh* the plaintiff must prove that there was in fact a default and or neglect on the part of the first defendant. In order to succeed in a claim for *ta'widh* the plaintiff must satisfy the court the following:

(a) The amount of *ta'widh* must not exceed the actual loss suffered by the financier, in this case the plaintiff;

(b) The determination of the *ta'widh* is made by the third party; and

(c) The default or delay of payment is due to the negligence of the customer, the first defendant.

(See Shariah Council Resolution dated 14 February 1998)

[99] From the evidence both testimonial and documentaries the following were observed:

(a) The defendants came to know of the imposition of *ta'widh* only in April 2013 *vide* the bank statements;

(b) *ta'widh* was charged retrospectively from 5 May 2006 to April 2013 and the total sum was about RM2,000,000;

(c) All bank statements sent prior to April 2013 made no mention of *ta'widh*, penalty and or compensation;

(d) No notices were issued to the defendants to notify the defendants of the default and or neglect on the MOD facility and or notice to require the first defendant to pay *ta'widh*, penalty and or compensation; and

(e) The plaintiff had in fact confirmed with its auditors that the amount due under the MOD facility was only in respect of the principle sum of RM3,000,000;

[100] It was apparent in the case at hand that the plaintiff had not proven the element of default and or neglect on the part of the defendants under the MOD facility, which is one of the three salient features to justify the plaintiff to claim for *ta'widh*. On this score alone the plaintiff's claim for *ta'widh* must fall.

Failure To Prove The Amount Claimed

[101] From the evidence that was adduced during the trial it was apparent that the plaintiff had not furnished the statement of account to the defendants prior to the filing of the case in court. The statement of account was prepared after 27 March 2013, after the CJ was entered. This statement of account was not a contemporaneous document, which could be relied upon as it was prepared at the time the case was still pending in court. From the evidence that was led in court the plaintiff had not satisfied the provision of s. 73A of the Evidence Act 1950 to justify the admission of the statement of account without having to go through the exercise to prove it in accordance with s. 73A of the Evidence Act 1950.

[102] The plaintiff's reliance on cl. 14.1 of the master facility agreement dated 15 December 2003 and the facility agreement dated 23 December 2004 as evidence of indebtedness was misplaced. It is pertinent for the plaintiff to prove by way of documents to demonstrate to the court as to how the figures were arrived at due to the following reasons:

(a) The figures which formed the basis of the statement of account were arrived at manually;

(b) The statement of accounts were not in tandem with the monthly statements issued by the plaintiff up to February 2013 and the audit confirmation letter.

[103] The plaintiff had not produced the documents, which formed the basis of the calculations to substantiate its claim against the defendants in respect of the *ta'widh*. The plaintiff merely relied on the summary of the calculation of *ta'widh* without producing the actual workings of the calculation which led to the figure of RM2,000,000,00 *ta'widh* having been imposed on the defendants. PW1 was not the maker of the document. Mr Chan who instructed PW1 to change the whole set of accounts was not called as a witness in court. The plaintiff too had failed to satisfy the court as to the reason the documents could not be produced for this court's perusal (see case of *KPM Khidmat Sendirian Berhad v. Tey Kim Suie* [1994] 3 CLJ 1; [1994] 2 MLJ 627; *Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd* [2007] 1 CLJ 611; [2007] 2 MLJ 229)

Observation

[104] It was the contention of the plaintiff that the tenure of the MOD facility was for a period of 12 months subject to a yearly review and to be fully settled from the date of the first drawdown. On the totality of the evidence before me I found that despite the first and second ASA and APA dated 15 December 2003 and 23 December 2004 respectively having been executed, there were no fresh ASAs and APAs being executed after the lapsed of the second ASA and APA on 22 December 2005. Notwithstanding that, the plaintiff had allowed the first defendant to utilise the MOD facility beyond the period of the expiry of the second ASA and APA. This could be seen in B-3 at pp. 522 to 527 of "B3" where the details of these transactions were reflected.

[105] The MOD facility granted to the first defendant was reviewed pursuant to letter dated 28 May 2009 (see pp. 398 to 400 of "B2"). This was rejected by the first defendant as evidenced by a series of letters issued by the first defendant (see pp. 402 to 403, 407, 411 to 412, 424 to 425 and 443 to 444 of "B2"). The dispute pertaining to the reduction on the MOD facility where the total amount granted under the second LO was unilaterally reduced by the plaintiff as discussed in the preceding paragraphs. The dispute pertaining to the reduction of the restructured MOD facility under the second LO led to the filing of this case in court.

[106] It was apparent from the evidence both testimonial and documentaries, both the contracting parties ignored the features of financing premised on the Islamic concept termed as *murabahah* and blatantly regarded the transaction as if it was a conventional loan. By their conduct, both parties were privy to the illegality and had camouflaged the MOD facility as *murabahah* and both had benefited from this illegality. Obviously, this transaction had clearly violated the basic tenets of the financing premised on the Islamic concept. Further as I had shown above the contract involving the MOD facility, which the parties termed as *murabahah* was contrary to the basic tenets of financing based on *murabahah* as there were no fresh ASA and

APA having been executed. In view of this and as both parties were privy to the illegality as illustrated above both parties had not come to this court with clean hands. The court therefore would not assist the parties who had come to court to seek relief, if they had not come with clean hands.

[107] In view of the above findings and bearing in mind, the principles illustrated under the heading 'Burden of Proof' neither the plaintiff nor the defendants had satisfied the test of proving each party's case on the balance of probabilities.

Conclusion

[108] On the totality of the evidence adduced by the plaintiff through its witnesses both testimonial and documentary and having evaluated the evidence of the defendants, I am satisfied that both the plaintiff and the defendants had not discharged the onus of establishing each party's pleaded case against the other on the balance of probabilities. Hence, the plaintiff's claim against the defendants and the defendants' counterclaim against the plaintiff were accordingly dismissed. Each party was to bear its own costs.

[109] In arriving at the above decision, I had carefully considered the evidence adduced by the plaintiff and the defendants both testimonial as well as documentary, the submissions by both the respective learned counsel as well as authorities tendered in support of their respective submissions.

[110] Lastly I would like to express my sincere appreciation to both learned counsel who had diligently and professionally conducted the trial before me and assisted me with their well researched submissions to enable me to decide this case.